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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 720

ELMER J. SCHNACKENBERG,
Petitioner,

vs.

ROLAND TOWLE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

BRIEF FOR RESPONDENT IN OPPOSITION.

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ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To The Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

OPINIONS BELOW.

The opinion of the trial court is unreported, (R. 3, pp. 34-45). The opinion of the Illinois Appellate Court is reported in 351 Ill. App. 497, 115 N. E. 2d 813 (1st District, 1953). The opinion of the Illinois Supreme Court is found in 4 Ill. 2d 561; 123 N. E. 2d 817 (1955).

JURISDICTION.

The jurisdiction of this court is claimed to be invoked under 28 U. S. C. sec. 1257(3). The federal question was raised by the petitioner for the first time in his petition for writ of certiorari.

QUESTIONS PRESENTED.

1. Has the State of Illinois, speaking through its highest court, the power to regulate the practice of law in the state courts of Illinois?

2. Does the Fourteenth Amendment to the Federal Constitution guarantee the right to practice law in the state courts?

3. Does the Fourteenth Amendment to the Federal Constitution guarantee that no state can change its public policy?

STATUTES INVOLVED.

Chap. 13, sec. 10 and chap. 37 sec. 365, of the Illinois Revised Statutes.

STATEMENT.

Prior to June 15, 1945, petitioner, Elmer J. Schnackenberg, Alvin L. Hansen and respondent, Roland Towle, were engaged in the general practice of law, as co-partners, under the name and style of Schnackenberg, Hansen & Towle. In 1944 that firm was employed by the Tool and Die Workers Institute to procure a release of its members from liability under the Illinois Retailers' Occupation Tax Act. Petitioner was in charge of that litigation and was assisted by respondent. A suit to enjoin the Department of Revenue of the State of Illinois from collecting such taxes was filed in October, 1944, and a consent decree against the department was entered in February, 1945, with one appearance in court. There was no appeal from that decision. In that case petitioner did the work with the assistance of respondent. As a result of that case, in June of 1945, that firm was retained by Norton

Company to prosecute its claim for refund against the Department of Revenue of the State of Illinois for retailers' occupation taxes paid which were not due. Petitioner had been elected a judge of the circuit court a few days before. Petitioner showed respondent the letter from Norton Company and said "Isn't that a shame that that letter should come in just when I am going on the bench?" Several days later petitioner said he could settle the Norton Company case the same as he did the tool and die workers' case and it shouldn't take very long; that respondent should assist him and be paid one-third of the fee. Thereupon petitioner and respondent entered into a memorandum in which it was agreed that petitioner was to do all the work required and that respondent was to assist him. Petitioner was unable to settle the *Norton Company* case and it became a hotly contested matter in which respondent tried it after many hearings before the Department of Revenue. There was then an appeal to the circuit court of Sangamon county, an appeal to the Supreme Court of Illinois, and a petition for certiorari granted by this Court. Respondent did 99% of the work, and, as the Supreme Court of Illinois characterized it, petitioner "contributed very little to assist in the labors and responsibilities of following the Norton litigation through all the courts of the land. The contract under scrutiny here was entered into with the firm belief that the *Norton* case could be settled quickly and profitably just like the tool and die workers' case, but that is not what transpired." Even though it was found that respondent did 99% of the work, petitioner insisted he receive two-thirds of the fee because the agreement was in writing.

WHEN AND HOW THE FEDERAL QUESTION WAS RAISED.

The first time petitioner claimed the decision of the Supreme Court of Illinois violated the Fourteenth Amendment to the Federal Constitution was in his petition for a writ of certiorari. If petitioner claimed his rights under the federal constitution were violated, he could have said so in his petition for rehearing or in his motion for reconsideration of his petition for rehearing to the Supreme Court of Illinois. Instead, he said in his petition for rehearing that the decision of the Supreme Court of Illinois was harsh and that a court of equity should not let such a result occur. That is not claiming a violation of constitutional rights. In the motion for reconsideration of his petition for rehearing, petitioner said that the decision of the Supreme Court of Illinois was contrary to the rudiments of American jurisprudence and that it was contrary to the fundamental principles of law and equity and not fair play. That language does not raise a federal question.

ARGUMENT.

Petitioner says that the violation of his rights occurred because the Supreme Court of Illinois arbitrarily stated a new public policy contrary to that which he claimed existed when the contract was made.

The Illinois Supreme Court did not declare a new public policy that judges could not practice law. Petitioner says, in the first sentence in his statement, that the law of Illinois permitted a judge to engage in the practice of law. That simply is not so. The legislature defined the policy of the state of Illinois in this regard in 1895 when it adopted paragraph 10 of chapter 13 of Illinois Revised Statutes, which states that no person who holds a commission as a judge in any court of record in the state shall be permitted to practice as an attorney or counsellor at law in the court in which he is commissioned or appointed. A circuit judge of Illinois has the power to sit in any circuit of the state. Hence, petitioner's commission permitted him to sit in the circuit court of Sangamon county, where the *Norton* case was tried.

The legislature also determined the public policy of the state of Illinois in 1931, when it said, in section 10 of the act in relation to a municipal court in the city of Chicago (Ill. Rev. Stat. 1953, Ch. 37, sec. 365) that no judge shall, during the term of his office, engage either directly or indirectly in the practice of law.

The Supreme Court of Illinois, in 1886, also declared the public policy of the state of Illinois in *Town of Bruce* v. *Dickey*, 116 Ill. 527, at page 537, when it said: "Propriety may forbid a judge of the Supreme or circuit court from

practicing law as not being congruous with the judicial office but we find no constitutional prohibition against it."

The Supreme Court of Illinois, again, in 1891, declared the public policy of the state in *O'Hare* v. *Chicago, Madison & Northern Ry. Co.,* 139 Ill. 151, and said, at page 155: "So also county judges may interchange with each other as circuit judges may do and hold court for each other and perform each other's duties when they find it necessary or convenient. While a judge was so presiding he would manifestly be inhibited from practicing as an attorney therein. The practice is not one to be commended because of the tendency to bring the administration of the law into disrepute and contempt."

In *London & Lancashire Indemnity Co.* v. *Tindall,* 377 Ill. 308, the Illinois Supreme Court, in 1941, noticed that the name of an acting circuit judge appeared on a brief before that court. That court, at page 315, said: "We note plaintiff's original attorney in the case, now an acting circuit judge, appears on the brief of appellant as of counsel. Whether this occurred with or without his consent, we do not commend the practice, even when the record shows he has withdrawn from the case."

Again, in *Evans* v. *Funk,* 151 Ill. 650, at page 658, the Illinois Supreme Court condemned a county judge for practicing law saying that its decision arose "from the strongest necessity of upholding the principles of public policy and maintaining the purity and honor of the courts of justice free from all scandal or suspicion of improper conduct on the part of the judges." Respondent respectfully urges that no new public policy was declared in the instant case.

Even if the Illinois Supreme Court had declared a new public policy, as petitioner urges, this court in *Thornton* v.

Duffy, 41 S. Ct. 137; 254 U. S. 361, 369 (1920) said that there can be no constitutional right that a state would not change its public policy and said "to assert that the first steps of a policy make it immutable, is to assert that imperfections and errors in legislation become constitutional rights. This is a narrow conception of sovereignty. It is, however, not new and we have heretofore been invoked to pronounce judgment upon it. Complying, we said, that an exercise of public policy cannot be resisted because of conduct or contracts done or made upon the faith of former exercises of it upon the ground that its later exercises deprive of property or invalidate those contracts. *Louisville & Nashville R. R. Co.* v. *Motley,* 219 U. S. 467."

In *Patterson* v. *Colorado,* 205 U. S. 454, at page 461, (1906) this court said: "There is no constitutional right to have all general propositions of law once adopted remain unchanged. Even if it be true, as plaintiff in error says, that the Supreme Court of Colorado departed from earlier and well established precedents to meet the exigencies of this case, whatever might be thought of the justice or wisdom of such a step, the constitution of the United States is not infringed * * *. But in general the decision of a court upon a question of law, however wrong and however contrary to previous decisions, is not an infraction of the Fourteenth Amendment merely because it is wrong or because earlier decisions are reversed."

In *Tidal Oil* v. *Flanagan,* 263 U. S. 444, page 450, (1923) this court said: "The parties to this action have been fully heard in the State Court in the regular course of judicial proceedings and in such a case the mere fact that the State Court reversed a former decision to the prejudice of one party does not take away his property without due process."

In *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, 79 (1937), this court said: "Supervision over either the legislative or the judicial action of the States is in no case permissible except as to matters by the constitution specifically authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the State and to that extent, a denial of its independence."

In *Buchalter* v. *N. Y.,* 319 U. S. 427, 431 (1942), this court said: "As already stated, the due process clause of the Fourteenth Amendment does not enable us to review errors of state law however material under that law."

In *Bacon* v. *Texas,* 163 U. S. 207, 221, this court said: "In cases of that nature there is room for the principle laid down that the construction of a statute and admission as to its validity made by the highest court of a State prior to the issuing of any obligations based upon the statute, enters into and forms a part of the contract and will be given effect to by this court as against a subsequent changing of decision by the state court by which such legislation might be held to be invalid. But effect is given to it by this court only on appeal from a judgment of a United States court and not from that of a state court. In other words, we have no jurisdiction, because a state court changes its views in regard to the proper construction of its state statute, although the effect of such judgment may be to impair the value of what the state court had before held to be a valid contract. * * * There was no subsequent legislative act impairing their obligation (bonds) and hence this court had no jurisdiction to review the judgment of the state court."

This court has stated that the right to regulate the practice of law is reserved to the states. In *Bradwell* v.

The State, 83 U. S. 130, 139 (1872), this court said: "The right to control and regulate the granting of a license to practice law in the courts of a state, is one of those powers which are not transferred for its protection to the federal government, and its exercise is in no manner governed or controlled by citizenship of the United States and the party seeking such license."

And again, in *In re Lockwood,* 154 U. S. 116 (1893), this court said: "The right to control and regulate the granting of license to practice law in the courts of a state is one of those powers that was not transferred for its protection to the federal government and its exercise is in no manner governed or controlled by citizenship of the United States in the party seeking such license".

This court thus determined that the Fourteenth Amendment does not regulate the right or privilege to practice law in the state courts.

Many other decisions have held that the right to practice law is not guaranteed by the Fourteenth Amendment but is a privilege granted by the states. Among them are *Application of Levy,* 214 F. 2d 331, 334; *Seigel* v. *Ragen,* 180 F. 2d 785, 788, certiorari denied 339 U. S. 990; *Starr* v. *State,* 159 F. 2d 305, 306, certiorari denied 67 S. Ct. 1348; *Emmons* v. *Smitt,* 149 F. 2d 869, 872; *Ruckenbrod* v. *Mullins,* 133 P. 2d 325, 331 (Utah); *Mitchell* v. *Greenough,* 100 F. 2d 184, 185, certiorari denied 306 U. S. 659; *Green* v. *Elbert,* 63 Fed. 308; *Brents* v. *Stone,* 60 F. Supp. 82, 84 and *Baker* v. *Varser,* 82 S. E. 2d 90, 97.

Petitioner claims he was not accorded procedure of due process of law because the Supreme Court of Illinois considered testimony to which an objection had been sustained and calls attention to this Court of the objection on page 77 of the abstract. That same testimony was later admitted without objection, as shown by the abstract on page 82 thereof. Petitioner also complains that the Supreme Court of Illinois refused to consider a principle settled by its prior decisions. As we have heretofore pointed out, the Fourteenth Amendment to the Federal Constitution does not guarantee no State Court will change its opinion.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this petition for writ of certiorari should be denied.

Respectfully submitted.

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APPENDIX.

Illinois Revised Statutes, 1953, Ch. 37, Sec. 365.

Relevant Parts of Illinois Revised Statutes Ch. 37, sec. 365—

"* * * nor shall any chief justice or associate judge of said court, during his term of office, engage, either directly or indirectly, in the practice of the law. * * *"